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A Short Primer For Massachusetts Employers On Employee Defamation Claims

Q: WHAT EXACTLY IS A CLAIM OF DEFAMATION?

DAVID C. HENDERSON: Elements of a defamation claim are that (1) someone wrongfully publishes a false statement about another person, (2) the statement is capable of damaging the person's reputation in the community, and (3) the statement causes economic loss or is actionable without proof of economic loss. A defamatory statement is actionable without economic loss if it constitutes libel, charges the other person with a crime, asserts that he or she has certain diseases, or prejudices his or her profession or business.

Q: DOES THE ACTIONABLE STATEMENT HAVE TO BE WRITTEN?

DCH: No. The defamatory communication also can take other forms. It can be oral (slander), written (libel), a gesture or expression, or an idea conveyed by behavior.

Q: BUT ISN'T THE "TRUTH" OF WHAT IS COMMUNICATED ALWAYS A DEFENSE?

DCH: No. "Truth" can be a defense in some circumstances. And as long as the communication is substantially true, a minor inaccuracy normally will not support a claim. But a narrow statutory exception in Massachusetts holds that the truth or falsity of a *written* defamatory statement is immaterial, and a libel action can proceed against an employer (or any other defendant), if the employee (or any other plaintiff) can show that the defendant acted with "actual malice" in publishing the truthful statement.

Q: SO, IN PRACTICAL TERMS, TO WHAT EXTENT IS THERE POTENTIAL LIABILITY FOR DEFAMATION IN THE WORKPLACE? CAN AN EMPLOYER BE SUED FOR MAKING A DEFAMATORY COMMUNICATION ABOUT ONE OF ITS OWN EMPLOYEES?

DCH: The short answer to the second question is "yes." There is no absolute privilege that protects employers from defamation claims by employees. There is, however, a *conditional* privilege that protects an employer against an employee's defamation claims whenever the disclosure of information is reasonably necessary to serve one of the employer's legitimate interests. And one such interest might be ensuring the fitness of the employee to perform his or her job. As a result, employers normally are not liable for defamation because of critical statements appearing in performance evaluations or other employee assessments.

Q: ARE THERE ANY FACTORS THAT COULD CAUSE AN EMPLOYER TO LOSE ITS CONDITIONAL PRIVILEGE AGAINST DEFAMATION?

DCH: Yes. The conditional privilege will not protect an employer if the employer (1) recklessly makes a defamatory statement that is an "unnecessary, unreasonable, or excessive publication"; (2) makes a defamatory statement with knowledge of its falsity or with reckless disregard of the truth; or (3) acts with actual malice when making the defamatory statement. According to one recent case, this type of "actual malice" that can cause the loss of the privilege occurs whenever the defamatory words are spoken out of "some base ulterior motive," which may include the intent to injure another, the intent to use the privilege as a pretense, or a reckless disregard of the rights of another.

Q: WHAT IS THE OVERALL BOTTOM LINE FOR EMPLOYERS?

DCH: Be truthful. Communicate about employees in ways that support a legitimate business interest. Avoid communicating anything with malice.



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